

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**DEFENDANTS' RESPONSE
TO BUNGIE'S MOTION FOR
RECONSIDERATION**

**Note on Motion Calendar:
November 16, 2023**

Oral Argument Requested

In accordance with the Court's request at the November 17, 2023 pre-trial conference that Defendants respond to Bungie's Request for Reconsideration (DKT#243), Defendants state as follows:

A. Bungie's Motion Fails To Comply With This Court's Directive That Motions For Reconsideration Are Disfavored And Require a Clear and Compelling Showing of "Manifest Error."

This Court properly denied Bungie's Motion in Limine No. 1, Sub-parts 2 and 3. Bungie does not and cannot establish the "manifest error in the prior ruling" needed to properly grant such a request and eviscerate the Court's prior rulings.

Local Civil Rule 7(h)(1) is clear and direct: "Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of

1 manifest error in the prior ruling or a showing of new facts or legal authority which
2 could not have been brought to its attention earlier with reasonable diligence.”

3 Bungie makes no effort whatsoever to argue that there are “new facts or legal
4 authority” to justify reconsideration, and the only argument Bungie makes is that this
5 Court committed “manifest error” in its prior ruling. The Court made no such error.
6 On the contrary, the Court *correctly* recognized that the issues supposedly decided
7 during arbitration were *not* necessary for the arbitration decisions and that the Court
8 could properly deny issue preclusive effects as to such purported “rulings.”

9 No doubt recognizing that it has no actual evidence of copyright infringement
10 on the part of the Defendants, Bungie hopes, instead, to bamboozle this Court into
11 ruling that, because Arbitrator Cox had somehow already determined that Defendants
12 infringed Bungie’s copyright and that Defendant James May was one of the culprits,
13 Bungie need not prove copyright infringement at trial, and can go directly to the
14 “damages” stage.

15 Bungie’s “request for reconsideration” in this regard is, in essence, an untimely
16 and legally deficient request that this Court reconsider its September 7, 2023 Order
17 (DKT#193) properly denying Bungie’s motion for summary judgment in its favor on
18 the question of copyright infringement. In its Order, this Court properly ruled that
19 issues of material fact existed, noting that, “Dr. Kaiser concedes...that Bungie has
20 never examined the software code for the Aimjunkies cheat software.” Faced with
21 these clear problems, Bungie transparently hopes to avoid them by claiming, falsely,
22 that copyright infringement was proved during the arbitration and a trial in this Court
23 on that issue is unnecessary. This is a desperate, last-minute and obvious “Hail Mary”
24 on the part of Bungie that should not be favored by this Court.

25 **B. The Supposed “Findings” Bungie Hopes To Ram Through Here Were Not**
26 **Necessary To The Issues Decided In Arbitration**

27 Relying on clear sophistry and convoluted reasoning, Bungie attempts to show
28 that the Arbitrator, *who was in no way charged with deciding Bungie’s copyright*

1 *infringement claim*, nevertheless somehow necessarily decided that Defendants did,
2 indeed, infringe Bungie’s claimed copyright. This is nonsense.

3 First, as a matter of law, “circumvention of technological measures” under 17
4 U.S.C. § 1201 exists independently of copyright infringement under 17 U.S.C § 501
5 and does not require any underlying copyright infringement in order for there to be
6 liability. On its face, the “circumvention” statute proscribes, “circumvent[ing] a
7 technological measure that effectively controls access to a work protected under this
8 title.” 17 U.S.C. § 1201(a). On the other hand 17 U.S.C § 501 which proscribes
9 copyright infringement provides that, “Anyone who violates any of the exclusive
10 rights of the copyright owner...is an infringer of the copyright.” In short, the copyright
11 infringement statute proscribes infringing one of the “exclusive rights” of copyright
12 holders, whereas the “circumvention” statutes proscribe defeating one or more
13 “technological measures” put in place to prevent unauthorized *access* to a copyrighted
14 work. “Circumvention” does not require proof or demonstration of copyright
15 infringement, and it was in no way essential that the Arbitrator consider or make any
16 findings relevant to copyright infringement (such as whether the “cheat software”
17 copies any code or makes “derivative works,” etc.). The sole question at arbitration in
18 this regard was whether the accused “cheat software” bypasses, defeats or otherwise
19 “circumvents” any “technological measures” Bungie had in place to restrict access to
20 its *Destiny 2* game. Again, the arbitrator was never asked or even authorized to
21 determine issues related to copyright infringement, and the question actually before
22 him, namely did Defendants “circumvent” any “technological measures,” did not, and
23 does not turn on whether there was copyright infringement.

24 Second, Bungies’ never-before-stated admission that it needed to prove
25 copyright infringement in order to prove “circumvention” is, if true, a further
26 indication that Bungie brought weak, unsupportable claims in its crusade against
27 Defendants and that it never had evidence of “circumvention” in the first place.
28 Bungie now apparently *concedes* that it had no actual evidence of any “circumvention”
of technological measures it put in place, and instead argues – for the very first time –

1 that it always intended to prove “circumvention” by demonstrating copyright
 2 infringement. If the questions of copyright infringement and circumvention were as
 3 intertwined as Bungie now claims, Bungie had no business referring its
 4 “circumvention” claim to arbitration in the first place. In particular, the very “Limited
 5 Software License Agreement” Bungie relies on (DKT# 34-1, pp. 18-27) itself provides
 6 that certain intellectual property claims, such as “claims for...copyright infringement,”
 7 are not subject to the mandatory arbitration clause of the agreement.

8 Nor was it necessary for the Arbitrator to make any finding that Mr. May
 9 personally engaged in “copyright infringement.” The Arbitrator simply (and
 10 incorrectly) “found” that Mr. May, “acted in concert with Phoenix [Digital] and its
 11 owners on matters giving rise to the claims that are the subject of this proceeding,”
 12 which is an extremely vague finding that can mean almost anything. What the
 13 Arbitrator does not say is that Mr. May engaged in any acts of copyright infringement,
 14 which is the sole claim being asserted by Bungie here. Again, whether the “cheat
 15 software” at issue here infringes Bungie’s copyrights was not before the Arbitrator,
 16 nor was the question of whether Mr. May, himself, engaged in any copyright
 17 infringement. This Court was absolutely correct to rule that, “The Arbitrator did not
 18 make this precise finding.” Not only did the Arbitrator not, “make this precise
 19 finding,” as established below, we was not authorized to make any such finding and
 20 lacked power to do so.

21 **C. The Arbitrator Was Not Authorized, And Had No Power, To Consider** 22 **And Decide Copyright Infringement Claims**

23 The reason for Bungie’s reconsideration request is clear. Bungie lacks evidence
 24 of copyright infringement and will not be able to prove such a claim at trial.
 25 Accordingly, Bungie blatantly attempts to claim that Arbitrator Cox has already
 26 decided critical copyright infringement questions in Bungie’s favor and, therefore, this
 27 Court not only should but *must* instruct the Jury to find copyright infringement. In
 28 fact, Bungie’s proposed jury instructions do just that. (See, e.g., Bungie proposed
 instructions V.4 – V.8 containing, among other things, an order to the jury that, “You

1 are further instructed to find that in order for the Cheat Software to operate, it
 2 necessarily creates unauthorized copies of the Destiny 2 code and unauthorized
 3 derivative works.” In light of such an instruction, why bother having a trial?) Again,
 4 Bungie is desperate to rely on such transparent and dubious shortcuts because it
 5 recognizes it cannot prove its case at trial. Not only is this specious nonsense, it
 6 attributes to the Arbitrator far more authority and power than he legitimately had.

7 Significantly, the question of copyright infringement was *not* referred to
 8 arbitration but remained the province of this Court. Indeed, under clearly established
 9 statutory law, questions of copyright infringement remain under the exclusive
 10 jurisdiction of the federal courts. *See*, 28 U.S.C. § 1338(a). Indeed, Arbitrator Cox in
 11 his Final Arbitration Award addresses *only* claims for (1) “Circumvention,” (2)
 12 “Trafficking,” (3) “Breach of Contract,” (4) “Tortious Interference,” (5) “Consumer
 13 Protection Act,” and (6) “Spoliation.” None of these claims expressly decided by the
 14 Arbitrator constitutes copyright infringement and the Arbitrator did not decide it. Nor
 15 could he. Under the terms of the Bungie Limited Software License Agreement, the
 16 Demand for Arbitration, the parties’ agreement with the Arbitrator and the Arbitrator’s
 17 agreement with the parties, the Arbitrator had no authority to decide, either directly or
 18 indirectly the material issues giving rise to alleged copyright infringement.

19 As noted by the very jury instructions Bungie proposes, Bungie fully intends to
 20 claim and argue that the supposed “factual issues” decided in arbitration *necessarily*
 21 result in copyright infringement and, therefore, it need not actually present evidence
 22 and prove anything at trial. This Court should not be a party to any such chicanery.

23 **D. This Court Has Wide Discretion To Deny Bungie’s Request**

24 As noted in Defendants’ opposition to Bungie’s motions in limine (DKT#231),
 25 issue preclusion does not apply unless the “issue” decided in an earlier case was
 26 essential and necessary to the disposition of the claim in the earlier case. As held by
 27 this court, issue preclusion, “bars a party from relitigating an issue if (1) the issue at
 28 stake is *identical* to the one alleged in the prior litigation; (2) the issue was *actually*

1 *litigated* in the prior litigation; and (3) *the determination of the issue in the prior*
 2 *litigation was a critical and necessary part of the judgment in the earlier action.*”
 3 See, *Certain Underwriters at Lloyd's, London v. Pettit*, No. C17-259RSM, 2018 U.S.
 4 Dist. LEXIS 33840, at *1 (W.D. Wash. Mar. 1, 2018) (emphasis supplied), citing
 5 *Clark v. Bear Stearns Co., Inc.*, 966 F.2d 1318 (9th Cir. 1992). None of these factors
 6 exists here. Bungie’s novel claim that, in order to prove “circumvention” it needed to
 7 prove “copyright infringement” is a last-minute, desperate and false claim that it
 8 concocted for the very first time in seeking reconsideration of this Court’s correct
 9 rulings on Bungie’s motions in limine. Bungie never made any such claim during the
 10 arbitration and such a claim appears nowhere in any of the pleadings and briefing filed
 in connection therewith.

11 Finally, and again, this Court has wide discretion not to find “issue preclusion,”
 12 particularly where, as here, it is “unclear” (to put it mildly) what actual “issues” were
 13 supposedly litigated in the arbitration below, whether those issues were, “a critical and
 14 necessary part of the judgment in the earlier action,” and where none of the issues
 15 before the arbitrator involved copyright infringement. For these additional reasons,
 16 Bungie has not demonstrated, nor can it demonstrate, that this Court committed
 17 “manifest error” in its November 15, 2023 Orders on Bungie’s motions in limine.

18 **CONCLUSION**

19 For all these reasons, Bungie’s motion for reconsideration should be denied.

20 Dated November 21, 2023.

21 /s/ Philip P. Mann

22 Philip P. Mann, WSBA No: 28860

23 **Mann Law Group PLLC**

24 403 Madison Ave. N. Ste. 240

25 Bainbridge Island, Washington 98110

26 Phone (206) 436-0900

27 phil@mannlawgroup.com

28 Attorneys for Defendants

I certify that this memorandum contains 1977 words in compliance with the Local
 Civil Rules.